



November 28, 2006

ELECTRONIC FILING

The Hon. Magalie R. Salas, Secretary
Federal Energy Regulatory Commission
888 First Street NE, Room 1A
Washington, D.C. 20426

***Re: FERC Docket Nos. CP06-54-000, CP06-55-000, CP06-56-000
Memorandum of Objection of CFE / Save the Sound to Broadwater Easement Request***

Dear Ms. Salas:

On behalf of Connecticut Fund for the Environment/Save the Sound (CFE/Save the Sound), an intervening party to these proceedings, I hereby submit CFE/Save the Sound's Memorandum of Objection, that was filed with the New York State Office of General Services (NYOGS) on November 14, 2006. The Memorandum was submitted in response to Broadwater Energy LLC's request to NYOGS for an easement in underwater land to construct and operate the floating liquid natural gas terminal that is the subject of these proceedings.

Respectfully submitted,

Roger Reynolds
Senior Staff Attorney
Connecticut Fund for the Environment/Save the Sound
205 Whitney Ave.
New Haven, CT 06511
(203) 787-0646 ext. 105
rreynolds@cfenv.org

Richard S. DiNardo
Law Student Intern

cc: e-service list

**STATE OF NEW YORK
EXECUTIVE DEPARTMENT
OFFICE OF GENERAL SERVICES**

In the Matter of the Petition of Broadwater Energy, LLC
for a grant of easement in lands under the waters of
Long Island Sound in the Town of Riverhead, County of Suffolk

OBJECTION OF CFE/SAVE THE SOUND

Save the Sound, a permanent program of Connecticut Fund for the Environment (“CFE/Save the Sound”) hereby object to the application of Broadwater Energy LLC (“Broadwater”) to the Commissioner of the Office of General Services (“OGS”) for an easement in underwater land to construct and operate a floating liquid natural gas (“LNG”) terminal or a floating storage and regassification unit (“FSRU”) in Long Island Sound.¹

CFE/Save the Sound is dedicated to the restoration, protection, and celebration of Long Island Sound through advocacy, education and research. CFE/Save the Sound is a bi-state organization and has approximately 6,500 members located primarily in Long Island, Westchester County and Connecticut. Many of CFE/Save the Sound’s members live on or near Long Island Sound, including the Town of Riverhead, and work or recreate in Long Island Sound and will be directly, and adversely, affected by the requested easement that would, among other things, close off a significant part of the Sound to use by the public.

¹ CFE/Save the Sound respectfully requests that copies of the application and all documents filed with OGS in this matter by parties or objectors be provided by the filing party to the undersigned counsel for CFE/Save the Sound.

I. Summary of Argument

Broadwater's application should be dismissed or rejected because it is deficient in the following respects: 1) it is an application for a structure, platform and/or yoke mooring system that fails to comply with the Requirements of NY Pub L § 75 and § 270 of the OGS regulations 2) the applicant is not an adjacent upland property owner and 3) the FSRU is of a different scope and size than the reasonable riparian uses contemplated by Pub L § 75. Alternatively, if OGS does not deny the application, the proposed floating LNG processing facility is of such a size and scope, and is a focus of such enormous public interest and opposition, that OGS should schedule a public hearing and should wait until the SEQRA/NEPA documents are completed to assist their review of the project and to fulfill the agency's duties under the Public Lands Law and the OGS Regulations.

II. Background

The Proposal: The Broadwater project is of a magnitude and scope that has not previously been seen in the Long Island Sound or considered by this agency. As proposed to the Federal Energy Regulatory Commission ("FERC"), the Broadwater FSRU would be a platform 1,215 feet in length, 200 feet in width and would rise approximately 80 feet from the water line to the deck.² The FSRU would receive an average throughput of 1 billion cubic feet of LNG per day and would store approximately

² U.S. Coast Guard Waterways Suitability Report for the Proposed Broadwater Liquid Natural Gas Facility at p. 48. Available at <http://www.uscg.mil/d1/units/seclis/broadwater/wsrpt/WSR%20Master%20Final.pdf>

8 billion cubic feet of LNG.³ LNG would be delivered in carriers with cargo capacities of up to 250,000 cubic meters.⁴ It would be secured to a yoke mooring system in Long Island Sound, approximately 9 miles from Long Island and just over 10 miles from Connecticut, at a depth of approximately 90 feet.⁵ International tankers would offload liquefied natural gas at the Broadwater terminal, which would convert it back to a gas and pump it through a pipeline on the floor of the Sound to the existing Iroquois pipeline that runs from Milford to Long Island.⁶ The proposed safety security zone is a circle centered around the mooring tower with a 1210 yard radius that would span a 1.48 square mile range.⁷ Commercial and private boaters and fishers and other members of the public would be permanently excluded from this area.

Public Opposition: Towns, citizens and environmental organizations vigorously oppose the Broadwater facility. In addition to the County of Suffolk, the New York towns of Riverhead, Brookhaven, Southold and Huntington have intervened in the FERC licensing proceedings to oppose the facility. Moreover, a law passed by the County of Suffolk specifically prohibits construction of floating Liquid Natural Gas facilities in Long Island Waters in Suffolk County.⁸ In Connecticut, 26 Towns, including almost all of the shoreline towns, have passed formal resolutions opposing the Broadwater facility.⁹ FERC has also been flooded with letters from the public objecting to the facility.¹⁰

³ Id.

⁴ Id.

⁵ Id. at 49.

⁶ Id. at 48.

⁷ Id. at 130.

⁸ Suffolk County Resolution 821-2006, "A Local Law to Prohibit the Construction and Operation of Liquefied Natural Gas (LNG) Floating Storage Regassification Units in The Long Island Sound," adopted August 28, 2006.

⁹ Towns that have passed anti-Broadwater resolutions include: City of Milford, City of Norwalk, City of West Haven, Town of Ashford, Town of Bethany, Town of Branford, Town of Chester, Town of Clinton, Town of Darien, Town of Deep River, Town of Easton, Town of Guilford, Town of Lebanon, Town of

The basis of the opposition by the towns, citizens and environmental groups is fourfold -- the Broadwater facility: 1) would be an unprecedented and inappropriate industrialization of a large portion of Long Island Sound and would make a large area of the Sound off limits to the public, 2) would be environmentally destructive, 3) would be unsafe and 4) is unnecessary. Due to the safety hazard posed by the facility, a large portion of the Sound surrounding the platform will need to be designated "no boating" and "no fishing," completely excluding public access to these waters. Water quality in the immediate area would be threatened by water intakes and discharges, sewage wastewater treatment, storm water runoff and potential liquefied natural gas spills. Potential explosions from platform operations, other technical malfunctions, and tankers shipping LNG to the facility will further threaten human and ecological health and safety. The visual and noise impacts of the massive lighted industrial facility would also be significant. Finally, a report by Synapse Energy Economics, Inc. has shown that Broadwater has failed to identify any compelling need for the new natural gas supply and that several alternatives that would better serve the region exist, including two regional natural gas projects that have already received regulatory approval.¹¹

Long Island Sound is one of the most beautiful and significant bodies of water in the United States. Over the past ten years, the federal government, and the states of Connecticut and New York, have spent hundreds of millions of dollars to restore and

Lisbon, Town of Newtown, Town of Old Saybrook, Town of Orange, Town of Plainville, Town of Prospect, Town of Redding, Town of Waterford, Town of Westbrook, Town of Weston, Town of Westport, Town of Wethersfield, Town of Woodbridge. Many other towns have expressed opposition but have not passed formal resolutions.

¹⁰ The individual objections and the entire Broadwater FERC Docket may be accessed at the FERC e-library by searching on Docket # CP06-54 at: <http://www.ferc.gov/docs-filing/elibrary.asp>

¹¹ Synapse Energy Economics, Inc, "The Proposed Broadwater Energy Import Terminal. An analysis and Assessment of Alternatives." Available at http://www.savethesound.org/LNG/BW_files/alternatives-analysis.pdf

protect the water quality of this national treasure. Recently Congress passed the *Long Island Stewardship Act of 2006*, appropriating \$25 million annually until 2011 for Long Island Sound. The Act's findings include, among other things, that: "(a) Long Island is a national treasure of great cultural, environmental and ecological importance, (b) . . . 28 million people (approximately 10 percent of the population of the United States) live within 50 miles of Long Island Sound [and] (c) activities that depend upon the environmental health of Long Island Sound contribute more than \$5,000,000,000 each year to the regional economy." Public Law No. 109-359 § 2(a).

Given that the region and the federal government have invested so much over the past 20 years to improve the Sound's environmental health and increase public access and also given the breadth and depth of the public concern, it makes little sense to rush this application through an administrative process that was not designed or intended to handle proposals of this scope and magnitude.

III. The application should be denied because Broadwater has improperly applied under Pub L § 3 (general authority for granting easements) rather than § 75 which specifically governs "Grants of Lands under Water" for structures.

Under Pub L § 75(7)(b) "no wharf, dock, pier, jetty, *platform*, breakwater, *mooring or other structure* shall be constructed, erected, anchored, suspended, placed ... in, on or above State-owned lands *underwater*, nor shall any fill be placed on such lands underwater, unless a lease, easement, permit, or other interest is obtained" from OGS. (emphasis added). "Structures" do not include discharge or intake pipes, pipelines, cables, or conduits, but do include moorings and platforms. Pub L § 75(7)(b). For the purposes of § 75, a "mooring" is defined as "a float, buoy, chain, cable, rope, pile, spar,

dolphin or any other device or combination of devices which is anchored or fixed in State-owned lands underwater, to which a boat/vessel may be made fast.” 9 NYCRR § 270-2.1(a)(11). A “structure” means “*anything* constructed, erected, anchored, suspended, placed in, on or above State-owned lands underwater or *any object* constructed, erected, anchored, suspended or placed on those lands other than cables, conduits, pipelines and hydroelectric facilities. 9 NYCRR § 270-2.1(a)(23).

The FSRU is clearly a mooring, platform and/or other structure pursuant to § 75(7)(b). The application seeks authorization for “a floating regassification unit located in Long Island Sound.”¹² The easement is for the FSRU and the security zone that surrounds it.¹³ According to Broadwater, the FSRU would be a “ship like vessel moored to the bottom of Long Island Sound.”¹⁴ The “FSRU would be built in a shipyard, towed to a location in the Sound and attached to a mooring system.”¹⁵

The language of the statute is plain and unambiguous. Thus, Broadwater may not apply under the general authority of Pub L § 3 subdivision 2 -- as could one who sought to construct a pipeline -- but must apply under the more specific authority of § 75 and meet the numerous substantive and procedural requirements.

Accordingly, because OGS lacks authority to grant an easement for the proposed structure under Pub L § 3 subdivision 2 the application should be denied.

IV. If OGS considers the application to be filed under Pub L § 75, it should be denied because Broadwater is not an adjacent landowner and the facility would not be reasonably related to any riparian rights held by Broadwater.

¹² Application of Broadwater Energy LLC for easement.

¹³ Id.

¹⁴ Broadwater Project Description, p.3. Available at http://broadwaterenergy.com/pdf/Full_Profile.pdf

¹⁵ Id.

The long-established “general rule” is that the title of the State to the seacoast and the shores of tidal rivers cannot be alienated except for some public purpose, or some reasonable use which can fairly be said to be for the public benefit. People ex rel. Underhill v. Saxton, 15 A.D. 263, 271 (N.Y. App. Div. 1897). This “public trust doctrine” provides that the State holds lands in its sovereign capacity as trustee for the beneficial use and enjoyment of the public.” Matter of Lupo v. Board of Assessors of Town of Huron, 2005 NY Slip Op 25295, 6 (N.Y. Misc. 2005).

The public trust doctrine has been incorporated into § 75 which permits OGS to grant rights to State-owned lands under navigable water to private parties subject to statutory limitations and restrictions OGS may impose in particular cases. Id. “Any grant must be consistent with the public interest in protecting and preserving the availability of navigable waters for public use and due regard for the legitimate interests of neighboring private property owners.” Id. Such grants may only be made to the upland riparian owner ("proprietor of the adjacent land"), a limitation designed to recognize and protect the riparian right of access to navigable water. Id.; Pub L § 75 (7)(a).

Under § 75(7)(a) the Commissioner may “grant . . . to the owners of the land adjacent to the land underwater specified in this section . . . so much of said land underwater as the commissioner deems necessary for that purpose. No such grant shall be made to any person other than the proprietor of the adjacent land.” (emphasis added).

This demonstrates the fundamental flaw of Broadwater’s application. It seeks to construct a facility in the middle of the Long Island Sound to which there is no immediately apparent adjacent land and to which they have no interest that could be

analogized, in any way, to a traditional riparian right. To the extent that there may specific adjacent land owned by Broadwater, the nature and scope of the proposed use cannot be said to relate to or grow out of the ownership of that land in any meaningful way.

The strict exclusionary language of § 75(7)(b) was added in 1992. The legislative findings to that Act explain that the purpose of the Act is to “ensure that waterfront owners’ reasonable exercise of riparian rights and access to navigable waters shall be consistent with the public interest in reasonable use and responsible management of waterways and such public lands for the purposes of navigation, commerce, fishing, bathing, recreation, environmental and aesthetic protection and access to the navigable waters and lands underwater of the state.” 1992 NY Laws ch. 791, § 1 (emphasis added).

Thus, there are two purposes to Pub. Lands § 75(7)(b): 1) to ensure that the use is reasonably related to the nature of the riparian rights of the adjacent upland property holder and 2) to ensure that such use is consistent with the rights of others to reasonably use such waters for traditional public trust purposes. The executive memorandum on the law identifies these same interests. The purpose, according to the memorandum, is to “Protect the public use of State lands for navigation, commerce, fishing and bathing and to serve the public interest in environmental protection, with due regard for the need for affected owners of private property to safeguard their property.” Executive Memorandum for 1992 NY Laws ch. 791.

The Broadwater project bears no resemblance to what the legislature contemplated when it acted to protect the “reasonable exercise of riparian rights” or the need for “affected owners of private property to safeguard their property.” The proposed

facility would industrialize and completely exclude the boating, fishing and commercial public from a huge portion of the Long Island Sound. This is different both in scope and scale from traditional uses such as the cultivation of clam beds, the construction of a dock or the construction of a mooring structure for traditional ships.

The easement Broadwater seeks from OGS is prohibited by the letter and spirit of §§ 75(7)(a) and (b). If Broadwater wants such an easement, it must seek it in the form of a grant from the legislature under its traditional public trust powers.

V. If OGS allows Broadwater to continue with its application under Pub L § 75, then OGS should consult with its sister state agencies and conduct a public hearing prior to making a decision.

OGS may require an additional public notice and comment period pursuant to § 270-5.4 of OGS Regulations and may also schedule a hearing on objections pursuant to § 270-5.5 of OGS Regulations.

Although OGS is not required to hold a public hearing before granting an easement in submerged lands, it must, pursuant to § 270-3.2(a), “ascertain the probable effect of the use, structure or facility on the public interest in State-owned lands underwater” and must do so examining the following factors:

- (1) environmental impact of the project;
 - (2) values for natural resource management, public recreation and commerce;
 - (3) size, character and effects of the project in relation to neighboring uses;
 - (4) potential for interference with navigation, public uses of waterway and riparian/littoral rights;
 - (5) water dependent nature of use;
 - (6) adverse economic impact on existing commercial enterprises;
 - (7) effect of the project on the natural resource interests of the State in the lands;
- and

(8) consistency with the public interest for purposes of fishing, bathing and access to navigable waters and the need of the owners of private property to safeguard their property.” 9 NYCRR § 270-3.2(a).

Moreover, § 270-3.2(b) also requires that:

The commissioner shall solicit the written comments of DEC, DOS and OPR&HP in their respective areas of expertise and give due regard to incorporating those comments in the review of the application and any plan of the use, structure or facility and shall incorporate into any grant, lease, easement, permit or lesser interest those conditions deemed necessary by the Department of Environmental Conservation to adequately protect the affected environment or natural resource. If the environment or natural resource cannot be protected as determined in findings by the Commissioner of Environmental Conservation, the proposed application shall be denied. Failure of the agencies to respond to the solicitation of comments within 45 days of the receipt of said solicitation shall constitute a waiver of review under section 75(d)(i) of the Public Lands Law but shall not affect review authority of the solicited agency pursuant to any other applicable statute or regulation.

Pub L § 75(7)(a) also mandates that, in making any grant under that statute, OGS must “upon administrative findings” attach “conditions to preserve the public interest in use of State-owned lands underwater and waterways for navigation, commerce, fishing, bathing, recreation, environmental protection and access to the navigable waters of the state.”

Thus, OGS, at an absolute minimum must consult closely with its sister agencies and reach meaningful conclusions supported by substantial evidence as to whether the unprecedented floating liquid natural gas facility proposed by Broadwater is consistent with the public trust and environmental considerations set forth in its regulations. Broadwater currently has an application before the Federal Environmental Regulatory Commission and has, or will have, applications before DEC and DOS. A draft environmental impact statement has not yet been compiled and a SEQRA analysis has not yet been completed.

The scope, scale and nature of the Broadwater proposal are unprecedented for Long Island Sound. As set forth above, it would permanently and completely eliminate public and other commercial access to a large part of the Sound, it would create substantial pollution problems and present substantial issues of security that the shoreline towns and their citizens will be left to grapple with. All of this would be to benefit an exclusively private and industrial purpose for which a genuine public need has not been established. If one wants evidence of how vital this issue is to the future of a healthy and thriving Long Island Sound, one need look no further than the vigorous and almost universal opposition by Long Island and Connecticut towns that will be affected, as well as the overwhelming opposition of individual citizens within those towns.

OGS could not possibly fulfill its statutory obligation to weigh these critically important considerations and to protect the public trust if the public itself is excluded from the process.

Accordingly, CFE/Save the Sound respectfully urges OGS to deny the application as legally insufficient under Pub L §§ 3 and 75. In the alternative, OGS should initiate a robust and transparent review culminating in a public hearing to allow the public to understand, evaluate and comment upon this project that stands to severely restrict their most fundamental rights - the right to public use of state waters and submerged lands. See generally, Idaho v. Coeur D'Alene Tribe, 521 U.S. 261, 286 (U.S. 1997) (the public character of submerged lands informs the principle that “these lands are tied in a unique way to sovereignty.”).

Respectfully submitted,

Roger Reynolds
Senior Staff Attorney
Connecticut Fund for the
Environment/Save the Sound
1st Floor
205 Whitney Ave.
New Haven, CT 06511
(203) 787-0649 ext. 105
rreynolds@cfenv.org

Richard DiNardo
Law Student Intern

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